Virginia Electric and Power Company *and* Ronald J. Zera. Case 5-CA-10466

July 21, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On January 18, 1982, Administrative Law Judge Thomas E. Bracken issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief. Respondent also filed limited cross-exceptions and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] We hereby correct the Administrative Law Judge's inadvertent error in stating that Respondent's maintenance workers were due into work by 8 a.m. rather than 7 a.m.

[2] In adopting the Administrative Law Judge's Decision, we note that no party excepted to his refusal to defer to arbitration.

DECISION

STATEMENT OF THE CASE

THOMAS E. BRACKEN, Administrative Law Judge: This case heard in Cumberland, Maryland, December 17–18, 1980, and May 12–15 and 19–22, 1981. The charges were filed by Ronald J. Zera, an individual,[1] on January 18, 1979, and the complaint was issued on May 30, 1980. The primary issue is whether the Company, the Respondent, violated Section 8(a)(1) of the National Labor Relations Act by terminating 25 employees because they engaged in protected concerted activity by participating in a grievance meeting on August 7, 1978,[2] for the purpose of discussing problems concerning working conditions with representatives of the Respondent.

[1] Zera also participated in the case as lead counsel for the Charging Party.

[2] All dates are in 1978 unless otherwise indicated.

Upon the entire record,[3] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company, a Virginia corporation with its principal office in Richmond, Virginia, is engaged as an electric utility in generating and distributing electric power within a three-state area. During the 12 months, the Respondent realized gross revenues in excess of $1 million. The Company admits, and I find, that it is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The International Brotherhood of Electrical Workers, AFL-CIO-CLC (IBEW), Systems Council U-1, and Local 2308 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Virginia Electric and Power Company (VEPCO) generates electricity for 1 million customers in the States of Virginia, West Virginia, and North Carolina. In the production of this electricity, VEPCO operates 10–12 widely separated power stations which are connected to one another by transmission lines. The only facility of the Company involved in the case, the Mount Storm, West Virginia, plant, produces 17 percent of the electricity generated by VEPCO for its residential, commercial, and industrial customers. It operates on a 7-day week, 24-hour-a-day basis.

VEPCO and the IBEW commenced their contractual relationship in the early 1940's when the first collective-bargaining agreement was entered into. In 1964, at the expiration of the then current contract, the parties had their first and only systemwide strike.[4] The Mount Storm plant began operations in 1964, and its employees were then part of the IBEW local union based in Charlottesville, Virginia. In 1971, a new local, Local 2308, was chartered by the IBEW exclusively for the Mount Storm employees. Local 2308 elects its own officers, who are full-time employees of the Company. It is one of nine locals which represent the employees of VEPCO at its various plants, and the nine locals are part of Systems Council U-1. This intermediate body employs a full-time business manager, who works out of Richmond.

In August 1978, the Mount Storm plant employed approximately 190 production and maintenance employees represented by Local 2308, all of whom were covered

[3] The General Counsel's unopposed motion to correct the transcript, dated July 30, 1981, is granted and received in evidence as G.C. Exh. 20.

[4] This was VEPCO's only experience with an economic strike and up to August 7, 1978, it had never experienced a wildcat strike at any of its stations.

by a collective-bargaining agreement that had an expiration date of March 31, 1979.[5] The contract, Joint Exh. 1, contained in article V, captioned "Strikes and Lockouts," two sections pertinent to this case:

> Section 1. The Brotherhood, the Local Unions, and its members individually and collectively agree that they will not call, encourage, or engage in any strike, slowdown or other interruption of work during the period of this Agreement or any extension or renewal hereof. The Company on its part agrees that there shall be no lockout during the period of this Agreement or any extension or renewal hereof, it being the desire of both parties hereto to provide an uninterrupted and continuous service to the public.
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> * * * * *
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> Section 4. Each employee agrees that he will not engage in a strike, slowdown or other interruption of work during the period of this Agreement or any renewal hereof and any violation of this Section will be ground for discipline or discharge and such discipline or discharge will not be reviewable under the grievance procedure except on the question whether such violation occurred.

As noted above, VEPCO had only experienced one economic strike. However, on August 7 it experienced its first wildcat strike when the Mount Storm employees who were represented by Local 2308 admittedly went on a wildcat strike.[6] Both the General Counsel and Respondent stipulated that the 25 dischargees who, along with approximately 160 other employees, participated and engaged to some degree in the strike and work stoppage at the Mount Storm station did so in violation of article V, sections 1 and 4, of the collective-bargaining agreement, and further stipulated that the strike was not authorized, sanctioned, or approved by the IBEW, Systems Council U-1, or Local 2308.

B. *Credibility*

With but few exceptions, the material facts in this case are not in dispute. One of the factors contributing to this situation is that, prior to the instant hearing, various witnesses had testified in from one to five hearings before other legal forums concerning various facets of the strike. These were a hearing before the United States District Court for the Northern District of West Virginia (the district court) in September; two West Virginia unemployment compensation hearings, one at Moorefield on January 4, 1979, and one at Keyser on March 27, 1979; and two arbitration hearings under the auspices of the Federal Mediation and Concilation Service, Case MS-76 on March 2 and April 3 and 4, 1979, and Case MS-78 on August 29, 30, and 31, 1979, and April 22, 1980. In addition, the bargaining unit employees had given sworn statements in "interviews" conducted by the Employer, which will be discussed below in section III,C,4.

There are several major factual situations at issue, and these will be resolved at the time the corresponding testimony is presented herein. One of these issues involves the Mount Storm Employees Association. In approximately 1971-72, the production and maintenance employees (the unit of employees involved herein) at the Mount Storm plant formed an informal group to get OSHA to investigate the dust situation at the plant, without the Union being involved. It had no officers, dues, or bank account, and ceased to function in the early 1970's.

C. *Sequence of Events*

1. August 4, 1978

On Friday afternoon, following an extensive investigation, VEPCO notified two employees, Gary Ebert and Harold Riggleman, that they were being discharged effective that day for filing false claims for meal money. Employee Lysle Bobo, vice president of Local 2308, was told of their discharge and, prior to the end of the day shift at 3:30 p.m., he filed a grievance with the Company, as step 1 of the contractual grievance procedure, protesting the discharge of the two employees.[7]

After Bobo left the plant at the end of his day shift, in driving toward his home at or about 4 p.m., he came upon an abandoned restaurant. Here he saw "a lot of employees," which he estimated to be 50 to 75, all from the Mount Storm station. Bobo joined the group and the employees discussed the discharges of Ebert and Riggleman, as well as other discharges during the past year, claims of excessive overtime, unsafe working conditions, and harassment by supervisors. Bobo informed the employees that the Union had filed a grievance concerning the two discharged employees, and processed it in step A. He also told them that a strike would be illegal and could not be sanctioned by the Union. At the men's request Bobo agreed that over the weekend he would contact Wilbur Grizzard, the business manager of System Council U-1, and Lucien Bledsoe, the International representative, both located in Richmond, to see what could be done. It was further agreed that they would meet again at the same abandoned restaurant on the following

[5] The station had a total work force of approximately 225 employees but the employees represented by the IBEW are the only employees material to this case.

[6] "Robert's Dictionary of Industrial Relations" 582 (rev. ed. Washington, D.C.: The Bureau of National Affairs, Inc. 1971) describes a wildcat strike as follows:

> Wildcat Strike—A work stoppage, generally spontaneous in character, by a group of union employees without union authorization or approval. Frequently it is called a group of employees because of some minor problem such as the disciplining of a union member. . . . A wildcat strike generally is in violation of applicable agreement.

[7] Art. VI, the grievance and arbitration provision of the contract, provides, in pertinent part, as follows:

> Section 1. Grievances: Should any dispute or difference arise between the Company and the Brotherhood or any employee or employees as to the interpretation or application or violation of any of the express provisions of this Agreement, or as to any alleged unjust supervisory conduct which causes an employee to be disciplined or lose his job, such grievance shall be handled in accordance with the grievance and arbitration procedures.

Monday at or about 5:45 a.m.[8] That evening Bobo notified Gene Ours, the president of Local 2308, that the employees had had a meeting and were talking about a wildcat strike.

2. August 5

On Saturday, Theodore Rosiak, the plant superintendent and highest company official at Mount Storm, received word from a supervisor that the employees were talking about going on strike. Rosiak then called Ours and discussed the situation with him. Ours stated that the Union did not sanction a strike, and that he understood employees could lose their jobs if they struck. Rosiak then reported this situation to VEPCO officials in Richmond. That evening, Rosiak was told by a foreman that the men were going on strike on Monday morning. Upon hearing this, Rosiak scheduled all supervisors, and the technicians and engineers represented by the Utility Employees Association, into the plant at 6 a.m. on Monday.

3. August 7

At or about 5:45 a.m. on Monday, approximately 30 employees met at the abandoned restaurant. Ours was present this time, as well as Bobo, and as Ours admitted there was talk of a strike. The union president advised the men of the consequences of such a strike, and after a short period of time left the meeting, proceeding to the plant.

Employees from the abandoned restaurant, as well as others, started gathering at the plant's spillway area[9] shortly before 6 a.m. At or about 6 a.m. Rosiak drove to the spillway area to open the coalyard gate.[10] Here he saw Ours and Bobo, as well as 50 to 60 employees who were spread across the spillway. Rosiak asked Ours what was going on, and Ours advised him that they were trying to take a vote. After remaining at the spillway for 5 to 10 minutes, Rosiak returned to his office. Ours admitted that he told the men that they could be fired if they went on strike, and that the Union would have nothing to do with a strike.

Rosiak visited the spillway area again at or about 6:30 a.m., where he again talked with Ours, and the union president advised Rosiak that the men had not yet decided what to do. Rosiak then informed Ours that 7 o'clock was starting time, and for the employees to decide what they were going to do about work by then. Upon the union president's telling Rosiak that he was trying to get them to go to work, Rosiak left for the plant.

Rosiak returned to the spillway for a third time at or about 6:45 a.m. for the longest and most active visit of that morning. This time the plant superintendent had conversations with other employees in addition to the union president and vice president. Rosiak saw Ours going through the crowd of, he estimated, 150 men, and, when he asked him what was going on, Ours told him that he guessed the men were not going to come into work. A crowd of men gathered around Rosiak, and they told him that the discharges of Ebert and Riggleman were too tough a penalty. They also brought up other complaints, which included an employee who had previously been suspended, safety matters in the coalyard, overtime, and harassment by supervisors.

The men then told Rosiak that they wanted Ebert and Riggleman reinstated, as well as the suspended employee, with backpay. Rosiak advised them that he could not reinstate these men, but that grievances had already been filed on their behalf by the Union, and he was willing to proceed with the grievances. At this point Rosiak moved away from the group, and saw many people raising their hands as if they were voting. Following this vote, the men spread out again across the spillway. Seeing this, Rosiak testified that he told the men that this was no way to settle the dispute: "I told them that if they'd go in to work, I'd sit down with the Union representatives and hear the grievances and that I wasn't going to have a meeting out there on the picket line, they had to go into work."[11] When the employees expressed concern about only union representatives being present, Rosiak then suggested there be a representative from each department, and, when an employee suggested two instead of one, he readily agreed.

Bobo completely corroborated this testimony of Rosiak, as did Ours. Bobo testified, "He wanted all of us to come into work and he said he would sit down and talk to the Union officials or so many men from each department or a combination of both."[12]

Shortly after 7 a.m. an employee[13] asked Rosiak what would happen if the employees went into the station and had the meeting. Rosiak told them that if they went to work then and there, "I would forget this ever happened." The employees did not accept Rosiak's offer of amnesty. The majority wanted to meet with Rosiak, but were not willing to meet in the plant. No mention was made at this time to meet on neutral grounds.

After the employees spread across the spillway again, Ours said to Rosiak, "I guess we're on strike." Rosiak then told Ours and the other employees that he did not have any more to say to them, and that they may have lost their jobs. Just before leaving the spillway he ad-

[8] Most of the production employees on the day shift were due at work by 7 a.m., with maintenance workers due at 8 a.m. Day-shift employees who relieved midnight-shift employees did so at 6:30 a.m.

[9] The spillway area (spillway) was about 80 feet wide, consisting of the dam and the plant road entrance located just off the Respondent's property, and was adjacent to State Highway 93. The single road leading into the plant from Highway 93 became two roads about 200 feet from the highway, where one branch became the coalyard road and the other became the main plant entrance road. The main plant was approximately one quarter of a mile from the spillway.

[10] Rosiak had arrived at the plant about 4:50 a.m., which was much earlier than his normal starting time. Opening the gate was not a part of his normal duties. The plant received an average of 120 truckloads of coal a day, and the same trucks took the fly ash out on leaving.

[11] Rosiak first saw pickets carrying picket signs several hours later. The signs were made of cardboard, roughly hand lettered, and read, "On Strike, Unfair Labor Practice, Unsafe Working Conditions."

[12] The General Counsel in his brief contends that Rosiak took an inconsistent position in the instant case as to who suggested a meeting with the employees. I do not find any inconsistency. Rosiak unquestionably wanted the employees to come into work, and as he testified in the unemployment compensation case cited by the General Counsel, there was a "mutual suggestion" that there be a meeting. But the bottom line was that Rosiak would not meet with representatives out on the picket line, but only in the plant after the employees came back to work.

[13] Identified by Gerald Sanders as Danny Cooper.

vised the union president, "If you want me, I'll be in my office willing to talk." This occurred at approximately 7:15 a.m., about 15 minutes into the day shift.

Shortly before 8 a.m. David Callis, the mechanical supervisor, received a request from two of his employees who had continued to work after their shift had ended. Pursuant to this request Callis drove to the plant entrance where he told Ours that these two employees wanted him to come into the plant and talk with them. Ours advised Callis that he could not go into the plant, and that the two employees would have to make up their own minds. Callis then returned to the station.[14]

Between 9 and 10 a.m. the employees began to form a committee to represent each department. As aptly described by employee Hubert Murphy, the committee was formed in a "hit or miss" manner in an atmosphere of confusion.

Some employees volunteered, and some testified that they agreed to be on the committee after being told by unremembered persons to do so.[15] Robert Harvey testified that he was asked by Mike Snyder to be on the committee. Terry Biser testified that he had gone on the committee at Alonzo Carr's request, but shortly thereafter asked to have his name removed. Biser then put Norman Kight's name on the list. Roger Elliot wrote down the names of those who were to serve on the committee, and admitted that he volunteered to be the spokesman.

At approximately 10 a.m. a group of 30 or 40 employees, which included most of the committee members, met at the Bismark garage, which is located about 1 mile from the station. Harold Shoemaker, the Union's recording secretary and a shop steward, was asked by the employees to write down their complaints.[16] The meeting lasted about a half hour and these employees returned to the spillway between 10:30 and 11 a.m.

Shortly after 10 a.m., pursuant to telephone instructions from his Richmond superior, J. W. Braswell, Rosiak, accompanied by Callis, drove to the spillway to locate Ours. His purpose was to request that the union officers come into work as a show of good faith. Upon learning that the union officials had left the picket line to go to the Bismark store, the plant superintendent and his assistant proceeded to Bismark. When Rosiak arrived he found Bobo in the store,[17] and was told that Ours was at home. Rosiak promptly called the union president and told him that he wanted him and the other union officials to come into work as a show of good faith and good will. Ours replied that he could not as he was waiting for some telegrams, but that he would call Bobo at the store in a few minutes. While waiting for Ours' call, Bobo advised Rosiak that there was a list of employees "that were leading this," and that Roger Elliot had the list. At or about 10:30 a.m. Ours talked to Bobo on the telephone and informed him that Rosiak wanted the union officials to go into the plant as a sign of good faith. Ours then instructed the vice president to go to the spillway and see what the feelings of the employees were as to the union officials going into the plant.

Bobo proceeded to the spillway, stood on the back of his pickup truck, and told the 75 to 100 employees about Rosiak's request that the union officials go into the plant. The employees declared that they did not want the union officials to go into the plant, and told him strongly that if Rosiak wanted to talk to them "we will talk to him on neutral grounds in a neutral place." Bobo admitted that he had not suggested to the employees that they meet with Rosiak on neutral grounds.

Bobo drove back to the Bismark store, called the union president, and informed him that the employees did not want the union officials to go into the plant, but that they were willing to meet with Rosiak on neutral grounds. At or about 11:30 a.m. Ours called Rosiak at the station, and told him that the employees had rejected his request that the union officials go into the plant, but that they had a committee of about 22 employees who wanted to meet with him, and that they would have one of them call Rosiak. The plant superintendent agreed to this.

At approximately 12:30 p.m. Rosiak received an anonymous phone call from, he believed, Alonzo Carr. According to Rosiak, the caller stated that he was a member of the Mount Storm Employees Association, and that they wanted to meet with Rosiak on neutral grounds.[18] Rosiak was told to come to the front gate to be contacted. The plant superintendent then called his supervisor in Richmond, and received instructions to meet with the strikers, but not to bargain or promise anything.

At or about 1 p.m. Rosiak and Callis went to the spillway. Rosiak stated that he understood that a "group of employees"[19] wanted to meet with him. Alonzo Carr replied affirmatively and presented a list of about 26 names which Rosiak had Callis copy. Following the copying of the list Rosiak asked Carr if he could keep the list, but Roger Elliot replied that the plant superintendent could not have it, and it was returned to Carr. There followed

[14] Employee Norman Kight testified that Rosiak came with Callis to the spillway between 8:30 and 8:45 where he told the employees that he would like to have a meeting with two or three men from each department. Employee Hubert Murphy testified that he saw Rosiak come to the spillway at or about 7:30 a.m. and ask for a couple of representatives from each department. Both men testified very hesitantly with no conviction, and I do not credit their testimony as to such a visit. Callis was a straightforward and impressive witness, and I credit his testimony that he came alone at approximately 8 a.m. to relay the request of the two working employees. Ours also corroborated this testimony of Callis.

[15] Donald D. Feaster, Ronald Funk, Larry S. Raimes, and Gerald L. Sanders.

[16] Shoemaker testified that he was there as an employee, and ascribed his being so selected to his handwriting ability. He took no further action to aid the committee.

[17] The employees had first gone to the store, but, because of their numbers, transferred their meeting to the larger nearby garage.

[18] This testimony was unrebutted. Carr did not testify and I credit Rosiak's testimony. However, I do not find that this phone call establishes that the group of employees was in fact calling itself the Mount Storm Employees Association at that time. The weight of the testimony is that the committee commenced calling itself the Mount Storm Employees Association on August 9, after a Show Cause Order was served on pickets at the spillway. The attorney, then hired by the strikers, required a retainer fee, with payments to be made by each striker. A bank account was opened for the deposit of these contributions, and the long-unused name of Mount Storm Employees Association was resurrected and used by the strikers for this purpose.

[19] Rosiak did not testify that he called this group the Mount Storm Employees Association.

a brief discussion on where to meet, with the employees again insisting that the meeting be held on neutral grounds. Rosiak suggested the nearby Mount Storm State Park pavillion, and this was agreed to by the committee.

Rosiak and Callis arrived at the park at or about 1:15 p.m., with the employees arriving at or about 1:20 p.m. Rosiak was advised that this committee represented all of the striking employees. Frank Litton proceeded to read a mixed list of approximately 29 demands, grievances, gripes, and miscellaneous matters[20] which Rosiak wrote down as Litton read them off. (G.C. Exh. 10.) Rosiak then stated that this was a very large list, and it could not be handled overnight. He then asked which ones were paramount and had to be satisfied prior to the employees' agreeing to return to work. The employees responded that their main demands were the reinstatement of four discharged employees, Riggleman, Ebert, Gary Bean, and R. Earle,[21] the revocation of the suspension of S. Goldizer, and a meeting with upper-level management officials from Richmond.[22] Rosiak then concluded the 20-minute meeting by stating that he would be back in touch with them.[23]

Rosiak and Callis returned to the station, and the committee members returned to the spillway, where they informed the rest of the men of the details of the meeting. In the late afternoon, VEPCO sent each employee a telegram instructing him to return to work on his next scheduled shift. No response was made. On the same day an International vice president of the IBEW sent telegrams to Ours, Bledsome, and Grizzard instructing them to have the men cease any unauthorized work stoppage, and to process any disputes in accordance with their labor agreement.

4. August 8, 9, and 10

On the following day, August 8, no employees having returned to work, VEPCO filed for and received a temporary restraining order in the district court, civil action No. 78-0136, which was served that evening on several pickets in the spillway area.[24] VEPCO also sent each employee a second telegram, notifying each that he was suspended indefinitely pending investigation. During the course of the day, the picketers placed logs across plant entrances.

Despite the temporary restraining order, on August 9, the employees continued to picket the plant's entrances. VEPCO then secured a Show Cause Order from the district court, which was served upon the employees in the picket-spillway area with a return for the following day. On Thursday, August 10, at a hearing before the district court judge, it was agreed that the picket line would be removed immediately, and that all employees who had not reported to work would remain suspended until VEPCO concluded individual interviews with each employee. At these interviews the employee would be given the opportunity to present his individual complaints and grievances, and also his involvement in the wildcat strike.

5. The post-strike events

From August 16 to October 10, interviews were conducted by two teams of VEPCO interviewers. These teams consisted of various management representatives, headed by E. Y. Price, the director of employee and labor relations, Wayne Atwood, the director of security, and J. W. Braswell, the director of production and maintenance operations. The interviews were conducted in the manner of depositions, and transcripts were made by court reporters. Each employee was allowed to have his personal attorney present, as well as his union representative.

During the course of the interviews the interrogators found common activities that were participated in by many of the strikers. A page, "interview checklist," was then developed to serve as a summary of an employee's activities in the strike. The top of the form called for filling in blanks on matters pertaining to the picket line, and the bottom half called for subjective comments. (G.C. Exh. 13.)

As the interviewers proceeded to interrogate the employees, they looked for what the company termed "leadership activities" in organizing and carrying out the strike. Some of the strikers' activities that were regarded as showing a leadership role were: serving on observation patrols, stopping vehicles at the various entrances to the plant, stopping trains attempting to come into the plant, seeking support from coal miners who worked for the nearby Laurel Run mine, placing logs across the plant's entrances, and serving on the strike committee. On the interview checklists for the employees involved in the instant case, General Counsel's Exhibits 12(A) through (Y), there is set forth in the "Other Comments" section, with one exception, that such employee was a representative or member of, or on, the Mount Storm Employees Association committee that met with Rosiak on August 7. Such a notation did not appear on the checklist of Roger M. Elliot, but there was the comment that he "volunteered to be a member of Mt. Storm Employees Association and actually wrote down names of members."[25]

On October 11, Price and the other two interview leaders made their report and recommendation to higher-level management in Richmond. This report broke the 188 employees into four categories, which it explained as follows:

> Category A is those employees that were sick, on vacation, etc., at the time of the strike. Category B

[20] A fair breakdown of these 29 items show there were 4 demands, 6 grievances, 16 general gripes, 3 specific gripes, 1 statement, and 1 request for a meeting.

[21] The record does not disclose when Bean and Earle were discharged, for what reasons, or if grievances were processed.

[22] The committee specifically did not want the business manager of Systems Council U-1 to be present.

[23] As the record discloses Rosiak never did get back in touch with the committee.

[24] Danny M. Cooper, William B. Dunham, Roger M. Elliot, Philip C. Fire, Joseph E. C. Kight, Sr., Leo R. Klosterman, Robert C. Martin, Roger R. Simmons, and Ralph L. Vance II.

[25] Rosiak testified that, while Elliot did not attend the meeting at the park, he was considered to be on the committee since his name was on the list given to the plant superintendent.

is those employees that attempted to come to work, but did not cross the picket line and went back home, or simply stayed away. They did not actually participate other than not reporting to work. Category C is those employees that actively took part in the picket area, but did not assume a leadership role. Category D is those employees that assumed a leadership role no matter how minor.

The report concluded by recommending that the 14 employees in category A and 17 employees in category B be returned to work, with the employees in category B regarded as on disciplinary suspension from August 7 to the date they returned to work. It was further recommended that the 116 employees in category C and 41 employees in category D be terminated.

For the next several weeks top-level management became involved in the decisionmaking process. VEPCO's president made the final decision, deciding not to discharge the 157 employees, but to discharge the approximately 40 employees remaining in category D. It was also decided that 29 out of the 40 approximately 116 employees in category C would receive an additional 3-week suspension. The Company's decision as to the final disposition of the 188 employees was set forth in its final report filed with the district court on October 26. (G.C. Exh. 14.) From November 7 to 11, the decisions on the reinstatement and discharges were effectuated.

On January 9, 1979, pursuant to a further order of the district court, VEPCO filed a more particularized statement as to the reasons for the discharge of the 40 employees. All 24 of the statements relating to the dischargees herein stated that the employee was discharged for engaging in an unauthorized work stoppage, and, in addition, set forth that he "actively represented the strikers." Price admitted that this term referred to membership on the strike committee that existed during the course of the wildcat strike. The record does show that the committee members agreed to serve on the picket line during the day-shift hours in case Rosiak wanted to talk to them. A log was kept at the plant entrance in a notebook by the strikers that recorded the coming and going of various persons and vehicles.

D. *Deferral to Arbitration*

From the first day of the hearing to the filing of its brief, the Respondent has strenuously argued that the Board should defer to the board of arbitrators' decisions rendered in cases MS-76 and MS-78 under the doctrine contained in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), and its progeny. The record discloses that in April and August 1979 arbitration hearings took place pursuant to the appropriate provisions of the collective-bargaining agreement of the parties. In both cases the arbitrators found for the Respondent, upholding the discharges.

In *Spielberg*, the Board held that it would defer to a private arbitration award disposing of a controversy before the Board if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the [arbitrator] is not clearly repugnant to the purposes and policies of the Act." *Pioneer Finishing Corporation*, 247 NLRB 1299, 1306 (1980). A further showing must be made that the arbitrator considered and resolved the underlying unfair labor practice issue. *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980).

The Respondent in its brief relies heavily on *Atlantic Steel Company*, 245 NLRB 814 (1979). However, I do not find that the instant case meets the test contained therein. *Atlantic Steel* requires that the respondent must show that the unfair labor practice was either impliedly or expressly considered. There is nothing in either of the two decisions in cases MS-76 and MS-78 to indicate that the arbitrators considered the overriding issue in the instant case; i.e., were the 26 employees who met with Rosiak at 1:20 p.m. on August 7 at the Mount Storm Park pavillion engaged in protected concerted activities within the meaning of Section 7 of the Act.

In case MS-76, the first of the two aribitration cases, the hearing was on the preliminary issue of whether the employees had engaged in activities in violation of the collective-bargaining agreement. The arbitrators found that the employees had engaged in a work stoppage in violation of the contract. In the second case, case MS-78, the arbitrators found their authority under the collective-bargaining agreement to be very limited and stated, "The Board cannot go beyond the question of whether the grievants had participated in a strike." The arbitrators, after reviewing the evidence, found that the grievants had engaged in a strike, and had been discharged for just cause. While it is true that the arbitrators commented that some employees served on a committee, they in no way, expressly or by implication, related this to, or connected it with, protected activity or an unfair labor practice. Moreover, the arbitrators nowhere conveyed an awareness of the statutory principles bearing on the Section 7 issues in this case. Under these circumstances deferral to the arbitration awards is not appropriate. *B & L Motor Freight, Inc.*, 253 NLRB 115 (1980); *General Warehouse Corp.*, 247 NLRB 1073 (1980), enfd. 643 F.2d 965 (3d Cir. 1981).

E. *Analysis and Conclusions*

The first question to be resolved is whether the 26 employees who met with Rosiak at 1:20 p.m. on August 7 at the Mount Storm Park pavillion were engaged in protected concerted activities. It is self-evident that they were engaged in concerted activities, so the issue reduces itself to whether these concerted activities were also protected activities. I am constrained to conclude that they were unprotected. There was a collective-bargaining agreement between the Company and the Union which clearly covered these employees. That longstanding agreement contained a no-strike clause and a grievance-arbitration procedure, and the Union had in fact filed a grievance with the Company protesting the discharge of the employees, whose discharge had so aroused the ire of its members. The General Counsel concedes, as he must, that these employees were engaged in a wildcat strike[26] contrary to the provisions of the bargaining

[26] The Charging Party did not concede that the employees engaged in a wildcat strike, but offered no evidence to rebut this finding.

agreement under which they worked, and that the Company had a right to discharge all 174 employees who participated in the illegal work stoppage. However, the General Counsel argues that the Respondent may not discharge the employees who attended the Mount Storm Park meeting because, when they did so, they "were engaged in protected concerted activity during the course of the unprotected wildcat strike."

One of the premises relied on by the General Counsel in reaching this conclusion is that it was Rosiak who asked for the meeting with this committee, and that in fact the meeting at Mount Storm Park "was sanctioned and approved, if not in part set up, by the Union." I do not find that this meeting was sanctioned or approved by Rosiak, but was merely tolerated, much like the captain of a ship who would agree to meet with his crew who had mutinied and surrounded his ship. The plant superintendent did propose just prior to 7 a.m. that, if the employees would come into the plant to work, he would sit down with their union representatives and discuss grievances. It is true that Rosiak, at the employees' request, altered this proposal by saying he would also meet with two representatives from each department, but this did not alter Rosiak's proposal that the meeting was to be in the plant and that the union officials be present.

Rosiak's only other proposal as to a meeting was made at or about 10 a.m. when he called Ours at his home and asked him and the other union officials to come into the plant as a sign of good faith. The strikers again refused to permit the union officers to enter the plant, but did offer a counter to Rosiak's proposal. However, their proposal was far different from Rosiak's proposal that the union officials come into the plant to show good faith. The group then used Ours as a conduit to notify Rosiak that they had a committee that wanted to meet with him.

The Mount Storm Park meeting was set up by this committee by its telephone call to Rosiak at 12:30 p.m. and by its summons to Rosiak that he meet a committee member at the picket line. It was at this 1 p.m. face-to-face meeting with Alonzo Carr that Rosiak acquiesced to the committee's demand and agreed that the meeting be on neutral ground. Likewise, there is nothing in the record to show, as asserted by the General Counsel, that the Respondent was aware that they were under an honest belief that when they met with Rosiak it was because they understood that he had requested the meeting. There was no reasonable evidence that would allow these employees to believe that Rosiak requested the meeting at the park. Since shortly before 7 a.m., when they voted not to go to work, employees had been running their own show free of any union ties. They had repudiated their president's advice not to strike, they had refused to allow their union officials to go into the plant, and they were making all decisions, including that they would meet with Rosiak on neutral grounds, without any union officials being present.

The General Counsel concedes that there are no cases directly on point, but points to one case as closely related, *Walter S. Johnson Building Co., Inc.*, 209 NLRB 428 (1974). I do not find that this case supports the General Counsel's position, as it involved the discharge of a shop steward who engaged in admittedly protected, as well as unprotected, concerted activities. In the instant case I do not find that the discharged employees engaged in any protected activities, so there is no dual motive for their discharge and the two cases are inapposite.

The General Counsel also contends in his brief that VEPCO, when deciding which wildcat strikers to discharge, used as a "controlling-deciding criteria" the fact that 26 of the discharged employees had met with Rosiak at 1:20 p.m. on August 7.[27] The Respondent in turn contends that it discharged only those employees who exercised a "leadership role" in the strike. I find that the dominant factor used by the Respondent to determine if an employee played a leadership role in the strike was membership on the committee or suspected membership on the committee. Director of Labor Relations Price admitted that membership on the committee was a criterion used to determine strike leadership, and that just being a member of the committee irrespective of any other conduct was a sufficient reason to place an employee in leadership category D.

However, I find no violation of the Act in the Respondent's use of this criterion. As stated in *Chrysler Corporation, Dodge Truck Plant*, 232 NLRB 466, 474 (1977): "It has been long and well established, by both the Board and the courts, that an employer may lawfully discharge an employee for engaging in a strike which is forbidden by the provisions of a no-strike agreement, because such activity is not protected by the Act."[28] It is also well established that, when a wildcat strike occurs, an employer "could 'pick and choose' strikers for discharge except that the choices could not be based on 'union considerations.'" *American Beef Packers, Inc.*, 196 NLRB 875 (1972); *J. P. Wetherby Construction Corp.*, 182 NLRB 690, 697, fn. 31 (1970).

The General Counsel in his brief at no point alleges that the Respondent's selection of the employees to be discharged was based on union considerations, nor could it be because there is not a scintilla of evidence to support any such contention. VEPCO was then free to pick and choose among the 174 strikers, and to select those who were to be discharged for its own economic reasons. VEPCO was not operating some small neighborhood enterprise whose shutdown would have little effect on interstate commerce. The Mount Storm facility performed an important part in generating electricity for customers living in a three-state area, and the IBEW itself recognized this duty to render continuous service to the public in its collective-bargaining agreement with the Company. The Respondent then had the right to

[27] Actually, 2 of the 26 employees discharged. Roger Elliot and Robert Martin, were not at the meeting, as stipulated in G.C. Exh. 2, stip. 19. However, Roger Elliot had been a known organizer of the committee, and Robert Martin had been at one time checked off by the Company as being on the committee.

[28] *N.L.R.B.* v. *The Sands Manufacturing Company*, 306 U.S. 332 (1939), *N.L.R.B.* v. *Magnavox Company of Tennessee*, 415 U.S. 322 (1974); *N.L.R.B.* v. *Rockway News Supply Company, Inc.*, 345 U.S. 71 (1953); *Russel Packing Company and Peerless Packing Company*, 133 NLRB 194 (1961); *Alton Box Board Company Container Division*, 155 NLRB 1025 (1965); *Stop & Shop, Inc.*, 161 NLRB 75 (1966); *Chesty Foods, Division of Fairmont Foods Company*, 215 NLRB 388 (1974). Also see *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *Bechtel Corporation*, 200 NLRB 503 (1972).

pick and choose those employees whom it wished to discharge based on any economic reason that it deemed pertinent. It did finally pick and choose out of the 174 employees who had been scheduled to work 25 employees whom it considered to be the leaders of the illegal strike. It could just as well have selected for discharge only those employees who had attended the meeting at Mount Storm Park, and this would still not have been a violation of the Act, as the reason for their discharge would not have been related to union considerations.

It is also argued by the General Counsel that "the right to engage in protected concerted activity and not be penalized for such engagement has a greater right of protection than the 'no-strike' clause." Since I have found that the discharged employees were not engaged in protected activity, this proposition need not be examined.

The General Counsel also cites several cases in which he contends that the Board has converted a strike in violation of a no-strike clause "into being protected concerted activity via the doctrine of condonation." I do not find that the cases cited stand for such a principle. Condonation is a doctrine developed by the Board whereby an employer is deemed to have rescinded an otherwise lawful discharge, thereby preserving a worker's "employee" status. As stated in *N.L.R.B.* v. *The Colonial Press, Inc.*:[29]

> The principle of waiver by condonation used in the context of labor relations is that, if after an employee commits acts of misconduct lawfully justifying his discharge, and thereafter the employer, fully cognizant of the acts, agrees not to discipline him, the employer may not thereafter rely on the same misconduct as the basis for discharging or refusing to reinstate the employee.

In the instant case VEPCO never agreed not to discipline the people on the committee or those who exercised a leadership role. In the lead case cited by the General Counsel to support this theory, *Richardson Paint Company*, 226 NLRB 673 (1976), the employer settled an illegal walkout dispute with the union, and agreed that there would be no reprisals. Nothing like the settlement in *Richardson* occurred in the instant case, and the doctrine of condonation is not applicable.

Finally, I find that the committee was not engaging in protected concerted activities because to so hold would undermine one of the deepest foundations of the National Labor Relations Act. It is a basic objective of the Act to encourage the negotiation and enforcement of collective-bargaining agreements between employers and the duly designated collective-bargaining representatives of their employees. To enforce these agreements, and to deal responsibly with the employer, a union must have the support of its membership. The wildcat strike called by the employees at the power plant, as well as their self-designation of a committee to meet with the Employer to bargain with it as the representative of all employees, was totally destructive of the legal right and obligation of the Union to exclusively represent these employees. *Emporium Capwell Co.* v. *Western Addition Community Organization, et al.*, 420 U.S. 50 (1975), affg. 192 NLRB 173 (1971).

The General Counsel in his brief asserts that for the Board to sanction the Respondent's actions in this case would be to discourage employees from trying to resolve wildcat strikes. I see no merit in this as the legitimate union officials, Ours, Bobo, and Shoemaker, were at all times present and available to lawfully represent the employees, but were summarily prevented from doing so by the wildcat strikers. The wildcatters also spurned the assistance of their Systems Council U-1 business representative, as well as their International representative. The strikers knew that there was a grievance procedure in their contract, they knew that the Union had filed a grievance on August 4 concerning the discharge of the two employees, and yet, in total defiance of their union officials' advice, on August 7 they called and enforced a wildcat strike. As stated in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960), "The grievance procedure [has long been recognized as] a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement." The members of this committee were still wildcat strikers when they met with Rosiak at the park and did not become clothed with immunity by taking part in a meeting in which they purported to be representing the employees. To hold that the discharged employees herein became protected by Section 7 of the Act because they served on the committee at the park would not only undermine Local 2308, but other collective-bargaining representatives, and would encourage rebellious employees to engage in wildcat strikes with all their attendant evils, thinking they would gain immunity from discipline by forming a rump committee.

Accordingly, I conclude that the Respondent did not violate Section 8(a)(1) of the Act when it discharged the employees set forth in appendix A of the complaint, and when it constructively discharged Robert P. Harvey. I shall therefore recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices violative of Section 8(a)(1) of the Act, as alleged in the complaint.

[29] 509 F.2d 850, 854 (8th Cir. 1975), cert. denied 423 U.S. 833 (1975), enfg. in part 207 NLRB 673 (1973).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[30]

The complaint is dismissed.

[30] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.